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No. 03-377

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IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on the Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A)—though there is no evidence of any Congressional intent to effect such a change—so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Bradley Nigh, Koons Buick Pontiac GMC, Inc., and Household Automotive Finance Corporation. Petitioner Koons Buick Pontiac GMC, Inc., states pursuant to Supreme Court Rule 29.6, that it has no parent companies, subsidiaries, or affiliates.

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BRIEF FOR PETITIONER

For thirty-five years—from the Truth in Lending Act's (TILA) passage in 1968 until the decision of the court below in 2003—the statutory damages remedy that now appears in 15 U.S.C. § 1640(a)(2)(A)(i) has always been constrained by an express provision that the liability it imposes "shall not be less than $100 nor greater than $1,000." Despite this language and a long history of consistent interpretation, the court of appeals below held that the $1,000 cap was rendered inapplicable to clause (i) by a 1995 amendment, which was directed to a different purpose entirely, and which left as they had been (indeed did not even re-enact) the pre-existing clause (i) and the limitation provision in issue.

In announcing this transformation of the statutory damages provision, the court below found it necessary only to parse the specific words of the narrow provision at issue. By ignoring the context, history and purpose of the Act, the court of appeals not surprisingly misconstrued the provision's words, which have an unambiguous plain meaning based on consistent usage in TILA and throughout the United States Code.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-22a) was issued on February 4, 2003 and is reported at 319 F.3d 119 (4th Cir. 2003). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 55a-56a) was issued on July 9, 2003 and is unreported.

The judgment of the United States District Court for the Eastern District of Virginia (Pet. App. 23a-40a) was issued on August 15, 2001 and is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing and rehearing *en banc* was issued on July 9, 2003. (Pet. App.

55a-56a) The petition for writ of certiorari was filed on September 4, 2003, and granted on January 20, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1640(a) of TILA provides, in pertinent part, that:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this part, . . . with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or
>
> (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;
>
> (3) in the case of any successful action to enforce the foregoing liability . . . , the costs of the action, together with a reasonable attorney's fee as determined by the court; and . . . .

STATEMENT

A. Overview Of TILA

TILA was enacted in 1968, as part of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666), to address the lack of uniformity in lender disclosures to consumers, S. REP. NO. 90-392, at 1-2 (1967). TILA is primarily a disclosure statute that requires creditors to disclose the cost of credit in consumer credit transactions using certain uniform terminology. The theory behind the Act is that if the terminology used in credit transactions is standardized, individual consumers can more readily compare credit costs and thus more easily shop for the best credit bargain. *See* Consumer Credit Protection Act § 102.

The "core" of TILA's uniform disclosure requirements involves the "finance charge" (the total cost to the consumer of credit) and the annualized simple rate of that finance charge (the "annual percentage rate").[1] 15 U.S.C. §§ 1605-1606; RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 1.01[1] (2002). Other required disclosures include: (1) time periods in which balances may be repaid without incurring finance charges; (2) the method of determining the balance upon which a finance charge will be imposed; (3) the methods of determining the amount of the finance charge; (4) various dates including payment due

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[1] TILA disclosure rules apply to both open-end credit and closed-end credit. Open-end credit plans are typically credit "plans" which contemplate repeated transactions and impose finance charges from time to time on any unpaid balance (*e.g.*, on-going charge accounts and credit cards). *See* 15 U.S.C. § 1602(i). Closed-end credit transactions generally involve fixed-term obligations such as retail installment sales and direct loans, where credit is extended in connection with a single transaction and is payable over a fixed term (*e.g.*, automobile financing, home mortgages, etc.). *See* RALPH J. ROHNER & FRED. H. MILLER, TRUTH IN LENDING ¶¶ 1.01[1], 5.01[1] (2000).

dates; (5) additional charges that may be imposed; (6) total amounts financed; (7) potential delinquency charges; and (8) descriptions of any creditor security interests related to the transaction. 15 U.S.C. §§ 1637-1639.

The Act applies to virtually every form of consumer credit transaction, *see* Regulation Z, 12 C.F.R. § 226.1(c)(1) (2003), "from home mortgages to small loans to credit card plans to even pawn transactions." ROHNER & MILLER, *supra*, ¶ 1.01. Covered transactions represent an enormous portion of the economy; consumer credit for 2003 alone was $2.04 trillion. *See* Federal Reserve Statistical Release G. 19, *Consumer Credit* (April 7, 2004), *available at* http://www.federalreserve.gov/releases/g19/Current (visited April 15, 2004). As to any particular transaction, the Act's requirements extend to both lending documents created at the initiation of a transaction and subsequent documents, such as periodic statements. 15 U.S.C. §§ 1637-1639.

TILA provides a three-pronged enforcement mechanism: administrative agency enforcement, criminal penalties, and private civil liability. 15 U.S.C. §§ 1607, 1611, 1640. Among these, private civil actions have emerged as by far the dominant means of enforcement. *See* ROHNER & MILLER, *supra*, ¶ 13.01; *see also Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998). This is due in part to the fact that TILA establishes in the civil context a remedial scheme of virtually strict liability that requires not only no fault on the part of the creditor but also no damages on the part of the consumer. 15 U.S.C. § 1640.

Creditors who commit violations of the Act's disclosure requirements may avoid strict liability in two limited ways. First, a creditor may correct the errors within 60 days of discovery and notify the consumer of the correction; this, however, is contingent on the consumer's having not yet brought suit or notified the creditor in writing of the error. 15 U.S.C. § 1640(b). Second, the creditor may assume the burden of "show[ing] by a preponderance of the evidence

that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1640(c).[2]

B. Background Of TILA's Statutory Damages Provision

Since its inception, TILA has authorized consumers to seek an automatic award of statutory damages for certain technical disclosure violations of the Act.[3]

1. Early Background (1968-1995)

The original 1968 TILA allowed only for a recovery of "twice the amount of the finance charge in connection with the transaction." This recovery was capped at $1,000 and did not require proof of any injury. In fact, the statute contained no right of recovery for actual damages. In relevant part, the original provision read:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability

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[2] TILA also affords very minimal arithmetic margins for error that in these limited instances except a creditor from strict liability. *See* 15 U.S.C. § 1605(f)(1)(A) ($100 margin for error in closed-end loans secured by real estate); 12 C.F.R. § 226.14(a) (providing margin for error in APR calculations of 1/8 of 1 percent); *id.* § 226.18(d)(2) ($5 variance for transactions with $1,000 or less financed and up to $10 variance for transactions with $1,000 or more financed).

[3] Pursuant to Section 1640(a), statutory damages are authorized for violations of the following TILA provisions: 15 U.S.C. § 1635; *id.* § 1637(a), (b)(4)-(10), (c), (d); *id.* § 1638(a)(2)-(6), (9).

> *under this paragraph* shall not be less than $100 nor greater than $1,000;

Pub. L. No. 90-321, § 130 (1968) (emphasis added); *see also* H.R. REP. NO. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976.

In 1974, Congress amended Section 1640(a) to allow for recovery of actual damages and to provide a separate statutory damages provision for class actions.[4] As part of these amendments, Congress relocated the original provision for statutory damages in consumer financing transactions from paragraph (1) of 1640(a) to new subparagraph (A) under 1640(a)(2). In the process of relocating the text to the new subparagraph, Congress removed the phrase "liability under this paragraph," which had been part of the $1,000 cap, and replaced it with the phrase "liability under this subparagraph." The relocated and amended text provided for statutory damages to be determined as follows:

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[4] Congress added this separate provision for statutory damages in class actions in response to a 1972 recommendation by the Federal Reserve Board that the Act be amended to place a tight ceiling on class action liability. *See* Federal Reserve Board, TRUTH IN LENDING ANNUAL REPORT TO CONGRESS FOR THE YEAR 1972, at 31 (1973). *See generally* ROHNER & MILLER, *supra*, ¶ 12.08[1]. The 1974 provision set a maximum class action liability of the lesser of $100,000 or one percent of the creditor's net worth. *See* Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1518 (1974).

Prior to this amendment, "individual plaintiffs had coupled the statutory recovery provided by the Act with the federal class action device in an effort to parlay individual claims of $100 to $1000 into towering class actions demanding as much as one billion dollars in statutory damages." Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418, 418-19 (1977) (footnotes omitted). *See generally* James K. LeValley & Richard K. Walker, *Truth-In-Lending Class Actions Under Amended Section 130*, 24 KAN. L. REV. 471, 475-77 (1976).

> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000;

Pub. L. No. 93-495, § 408 (1974) (emphasis added).

The next amendment of this provision was enacted in 1976 in response to the growing number of transactions in which consumers acquired goods—primarily automobiles—by lease rather than by extension of credit, so that no finance charges were incurred. S. REP. NO. 94-590, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432. At that time, Congress passed the Consumer Leasing Act, which applied truth-in-lending protections to consumer leases. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976).

In amending the statutory damages provision of TILA to cover consumer leases, Congress did not enact an entirely new provision, but instead directed that provision (2)(A) be modified to "insert '(i)' after '(A)'" and to add the text of current clause (ii). Pub. L. No. 94-240, § 4 (1976). With these revisions, provision (2)(A) defined the measure of statutory damages as follows:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000;

Nothing in the text or legislative history of this 1976 amendment suggested any purpose to render the $100-$1,000 limitation inapplicable to the original "twice the amount of any finance charge" measure of liability. To the contrary, the Senate Report simply explained that the Act was creating for consumer leases a civil penalty "equivalent

in dollar amount to that imposed on other creditors." S. REP. NO. 94-590, at 8, *reprinted in* 1976 U.S.C.C.A.N. 431, 438.

Accordingly, following the 1976 amendment, cases predicating liability on clause (i) consistently found the $100-$1,000 limitation still to apply. *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) ("In the event that a creditor fails to [comply with TILA], a consumer may bring a civil action against the creditor [and] may recover twice the amount of the finance charge (but not less than $100.00 nor more than $1,000.00)."); *Cowen v. Bank United, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) (same); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (same); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981) (same).

2. The Addition Of Clause (iii) In 1995

TILA's statutory damages provision was not amended again until 1995, when Congress added clause (iii). Pub. L. No. 104-29, 109 Stat. 271 (1995). The addition of clause (iii) was part of a much broader series of changes to TILA, which principally concerned home mortgages and was brought about by the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). *See* H.R. REP. NO. 104-193, at 52, 1995 WL 432335, at *52. *See generally* ROHNER & MILLER, *supra*, ¶ 6.01[1]-[3]; Robert A. Cook, *Truth in Lending Act Amendments of 1995*, 49 CONSUMER FIN. L.Q. REP. 239 (1995).

In *Rodash*, the court of appeals held that certain small fees (such as a $22 Federal Express charge) in mortgage lending transactions were required to be disclosed as part of the "finance charge." Because virtually the entire mortgage lending industry had for some time failed to make these disclosures, the industry was exposed to great financial liability in the wake of the decision. *See generally* ROHNER & MILLER, *supra*, ¶ 6.01[2] ("If widely followed, *Rodash* could have had the effect of creating such liability for

hundreds of thousands of loans, requiring the mortgage industry to absorb disastrous losses." (footnote omitted)).

As a result, more than 50 nationwide class actions were filed to seek rescission of mortgages based on *Rodash*-type violations.[5] *See* 141 Cong. Rec. S14567 (daily ed. Sept. 28, 1995) (statement of Sen. D'Amato). In light of these class actions, Congress in the Spring of 1995 enacted a class-action moratorium through October 1, 1995 on TILA claims, recognizing that the financial risks unleashed by *Rodash* could run "as high as $217 billion." 141 Cong. Rec. at H9515 (daily ed. Sept. 27, 1995) (statement of Rep. Roukema).

On the eve of the expiration of the moratorium, Congress—by unanimous consent in both houses—passed the 1995 TILA amendments. *See generally* Robert A. Cook, *Truth in Lending Act Amendments of 1995*, 49 CONSUMER FIN. L.Q. REP. at 239 ("With the moratorium set to expire on Sunday, the House passed the Truth in Lending Act Amendments of 1995 . . . on the previous Wednesday, the Senate acted on Thursday, and the President signed the bill into law on Saturday[.]"). These amendments foreclosed the possibility of class-action suits based on the *Rodash* decision and clarified the requirements of TILA so as to prevent such a situation from recurring. *See generally* ROHNER & MILLER, *supra*, ¶ 6.01[3].

Included in the 1995 amendments was a provision adding clause (iii) to TILA's statutory damages provision.[6] Prior to

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[5] Under TILA, there is a 3-year right of rescission for any non-purchase money mortgage on a consumer's home or dwelling if that mortgage fails properly to disclose the finance charges. *See* 15 U.S.C. § 1635(f). *See generally Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998). The result of rescission is that the security interest becomes void and the consumer is entitled to a full reimbursement of all finance charges thus far paid. *See* 15 U.S.C. § 1635(b).

[6] The provision that amended Section 1640(a)(2)(A) stated in its entirety:

the addition of clause (iii), closed-end mortgages had fallen within the general scope of clause (i) and, therefore, had been subject to the $1,000 cap on statutory damages. *See, e.g., Mayfield v. Vanguard Sav. & Loan Ass'n*, 710 F. Supp. 143, 146-47 (E.D. Pa. 1989); *Brown v. Nat'l Permanent Fed. Sav. & Loan Ass'n*, 526 F. Supp. 815, 822 (D.D.C. 1981), *aff'd in relevant part*, 683 F.2d 444 (D.C. Cir. 1982).

Clause (iii) changed that by doubling that cap to $2,000. Floor statements in the Senate and House noted that "the bill raises the statutory damages for individual actions from $1,000 to $2,000." 141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); *see also* 141 Cong. Rec. H9515 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum) (same). The House Committee Report explained the change as follows:

> Recognizing the difficulty of proving actual damages and the increase in costs involved in mortgage lending, this amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling . . . .

H.R. REP. NO. 104-193, at 99, 1995 WL 432335, at *99.

Other than the addition of the phrase "not less than $200 or greater than $2,000," the movement of the word "or" to

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Sec. 6 CALCULATION OF DAMAGES

Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. § 1640(a)(2)(A)) is amended—

(1) by striking "or (ii)" and inserting "(ii)"; and

(2) by inserting before the semicolon at the end the following: ", or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000".

Pub. L. No. 104-29 § 6, 109 Stat. at 274.

immediately precede "(iii)," and the updating of a statutory reference included in clause (ii), Congress did not otherwise modify provision (A). Nothing in the legislative history of the 1995 amendment suggested any purpose to remove the longstanding $100-$1,000 limitation from the liability provision of clause (i).

In fact, until the decisions in this case, the addition of clause (iii) had never been understood to have eliminated the $1,000 cap on liability under clause (i). For example, shortly after the passage of the 1995 TILA amendments, the Office of the Comptroller of the Currency issued an official policy announcement to banks and other lending institutions that detailed the changes. With respect to the substantive effect of clause (iii), the announcement provided only that "[p]unitive damages have been increased for transactions secured by real property or a dwelling from a maximum of $1,000 to a maximum of $2,000 (closed-end credit only)." Office of the Comptroller of the Currency, *Truth in Lending Act Amendments of 1995*, OCC-96-01, 1996 WL 33111, at *1 (Jan. 5, 1996) (emphasis added).

Indeed, in 1997 a unanimous panel of the Seventh Circuit Court of Appeals held that "the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)." *Strange v. Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997).

C. Proceedings Below

On October 3, 2000, Respondent Nigh filed suit against Petitioner Koons Buick Pontiac GMC, Inc. ("Koons Buick"), in the United States District Court for the Eastern District of Virginia. Nigh's suit revolved around his purchase of a used Chevrolet Blazer from Koons Buick in February 2000. Nigh alleged violations of TILA, the Federal Odometer Act (FOA), and the Virginia Consumer Protection Act (VCPA),

as well as common-law causes of action sounding in fraud, conversion, and breach of contract. Koons Buick filed counterclaims for breach of contract and fraudulent and negligent misrepresentation.

During the sales transaction—which went through several permutations and was memorialized in three successive retail installment sales contracts ("RISCs")—a $965 car alarm was mistakenly included in the second RISC. Before the deal closed, however, a prospective third-party lender caught this error and informed Koons Buick, who in turn prepared a third, corrected RISC that deleted any reference to charges for the car alarm. While Nigh personally executed this corrected RISC, he subsequently brought suit under TILA based upon the error in the earlier RISC that had never taken effect.

Prior to trial, the district court threw out virtually all of Nigh's forty-odd factual allegations—including all of those sounding in fraud, conversion, and breach of contract. The only three allegations to survive presented claims under TILA, VCPA, and FOA. *See Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 563, 569 (E.D. Va. 2001); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535 (E.D. Va. 2001). The district court also entered judgment in favor of Koons Buick on two breach-of-contract counterclaims based on Nigh's failure to make promised payments. 143 F. Supp. 2d at 560.

As part of his TILA claim, Nigh sought an uncapped statutory damages recovery under 15 U.S.C. § 1640(a)(2)(A)(i) equal to twice the total finance charges on the earlier RISC. Petitioner objected, arguing that any TILA award to Nigh must be limited to $1,000 under the plain terms of the Act. The district court ruled that liability under Section 1640(a)(2)(A)(i) is not capped at $1,000 (JA 647, 653-55)[7] and instructed the jury that if it found that Koons Buick violated TILA, Nigh was "entitle[d] . . . to receive statutory damages of twice the amount of any finance charge in connection with the transaction."[8] (*Id.* at 670)

On May 3, 2001, the jury returned a verdict in Nigh's favor on the TILA and VCPA claims (although it expressly refused to award punitive damages) and found in Koons Buick's favor on the FOA claim. With respect to the TILA claim, the jury awarded Nigh $24,192.80, which was twice the amount of the finance charges in connection with the second RISC. *Id.* at 756-57. On August 10, the district court awarded Respondent attorneys' fees and court costs in the amount of $26,129.10. (Pet. App. 53a) A final judgment was entered on August 15 and an appeal was then taken. (*Id.*, 37a-39a)

On February 4, 2003, the Fourth Circuit Court of Appeals affirmed the judgment of the district court. (*Id.*, 1a-22a) Among other issues before the court of appeals was the question whether liability under clause (i) of 15 U.S.C. § 1640(a)(2)(A) is capped at $1,000. The court of appeals divided two-to-one on this issue.

The majority affirmed the $24,192.80 award of statutory damages, determining that the $1,000 damages cap described in Section 1640(a)(2)(A) applies only to clause (ii). (Pet. App. 11a) Although acknowledging that prior to the 1995 amendment liability under both clauses (i) and (ii) was

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[7] "JA" refers to the Joint Appendix filed by the parties in the Fourth Circuit.

[8] During deliberations, the jury submitted a question to the court, asking whether it was required to give Nigh twice the finance charges if it found Koons Buick had violated TILA , or whether it "ha[d] the discretion to give a different amount." (JA at 749) The court informed the jury that it did "not have the discretion to award a lesser amount" if it found for Nigh on his TILA claim. (*Id.*, 753)

capped at $1,000, the court of appeals nonetheless concluded that this "interpretation [is] defunct" because of the placement of clause (iii). (*Id.*, 11a) As the majority saw it, the term "subparagraph" has no fixed meaning and, under the statute as amended, must necessarily refer only to § 1640(a)(2)(A)(ii). (Pet. App. 12a) For confirmation, the majority observed that the $200-$2,000 statutory minimum and maximum in clause (iii) "shows that the [$1,000 cap] previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)." (*Id.*, 11a)

In dissent, Judge Gregory found that the $1,000 damages cap, which had been applied consistently to liability under clause (i) prior to the 1995 amendment, continued to apply under clause (i). (*Id.*, 17a) First, noting the Fourth Circuit's own decision in *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65, 67 (4th Cir. 1983), he reasoned that *Mars* is "still good law because there is no evidence that Congress [in 1995] intended to override" the application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii). (*Id.*, 20a)

Second, he observed that the court's reasoning depends on a finding that the meaning of the word "subparagraph," while neither expressly redefined nor even re-enacted, was implicitly changed by the addition of the new clause (iii), which meant that it could no longer apply to all of (A). (*Id.*, 20a-21a)

Third, he reasoned that "[i]f the $1,000 cap was intended to apply only to (ii) . . . then the inclusion of the phrase 'under this subparagraph' would be superfluous; the meaning of (ii) would be unchanged by its deletion." (*Id.*, 21a)

Fourth, Judge Gregory pointed out that the majority's interpretation of the phrase "under this subparagraph" is inconsistent with the use of the same phrase in Section 1640(a)(2)(B) (concerning class actions). (Pet. App. 21a)

There "the phrase 'under this subparagraph' . . . indisputably applies to all of subparagraph (B)." (*Id.*)

Fifth, he rejected the majority's assertion that reading the phrase "under this subparagraph" as applying to all of provision (A) would render meaningless the separate $2,000 cap on liability under clause (iii). As Judge Gregory explained, "the most logical interpretation of the statute is to read the phrase 'under this subparagraph' as applying generally to [subparagraph (A)], and to read [clause (iii)] as creating a specific carve-out from that general rule for real-estate transactions." (Pet. App. 22a) He also noted that the majority's reading would "dramatically increase creditors' liability exposure under § 1640(a)(2)(A), without any explicit statutory language to support such an increase." (*Id.*, 22a)

The majority either dismissed or ignored Judge Gregory on each point. With respect to the absence of evidence that the 1995 Congress sought to overturn the long-established interpretation of clause (i), the majority responded that it was not the court's "responsibility . . . to determine whether there is evidence that 'Congress intended to override the Fourth Circuit's' precedent (or any circuit precedent for that matter)." (*Id.*, 12a) As for Judge Gregory's argument that the meaning of "subparagraph" did not change with the mere addition of clause (iii), the majority stated simply that "Congress' amendment requires that the reference point of the 'under this subparagraph' clause be the subparagraph of § 1640(a)(2)(A)(ii) and not the subparagraph of § 1640(a)(2)(A)," and added that Judge Gregory's contrary argument "ignore[d] the plain reading of that term." (Pet. App. 12a)

Likewise, in responding to Judge Gregory's argument that the majority's interpretation creates surplusage in the statute, the majority argued that "if the 'under this subparagraph' clause had been omitted from the amended statute, Judge Gregory would have a much better case" for arguing that the

$100-$1,000 limitation applies to liability under clause (i). The majority believed that the use of the term requires reference to the "distinct subparagraph" (ii) (*Id.*, 12a-13a) and ignored altogether Judge Gregory's argument that "subparagraph" as used in the adjacent class-action provision demonstrates that the term has a fixed meaning that applies to the whole of provision (A).

The majority also ignored Judge Gregory's argument that clause (iii) with its separate $200-$2,000 limitation is simply a "carve-out" for real-estate transactions "from the general rule [of $100-$1,000 liability]." The majority did add, however, that it is irrelevant that the $200-$2,000 limitation of clause (iii) does not contain the "under this subparagraph" language. As the majority saw it, the only conclusion to be drawn from this absence is that "the plain language of each [damage cap] must be interpreted individually to ascertain its meaning." (*Id.*, 13a)

In conclusion, the majority stated that:

> It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995. . . . It is the statute, not any inferential intent, that constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent. In this way, and in this way only, are the constitutional roles of the legislature and the courts respected.

(Pet. App. 13a)

SUMMARY OF ARGUMENT

The decision of the court below is a flamboyant caricature of strict legislative construction, bold in its rejection of any assistance from such interpretive guides as context, history, and "inferential" legislative intent. It is ironic, then—but not really surprising—that the court's error is most apparent on the very grounds on which it stakes its claim, the plain meaning of the particular provision at issue. By ignoring the organic relationship of words and ideas, the court of appeals reached an absurd interpretation of statutory language, which, while perhaps not a model of clarity, is easily understood upon modest circumspection. *See, e.g., United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993).

TILA's statutory damages provision, applicable to specified technical violations without any showing of injury, is the product of legislative accretion. As originally enacted in 1968, it had only a single provision—the one at issue here—which provided for a recovery from consumer creditors equal to twice the finance charge, but confined such recovery to the range of $100 to $1,000.

As relevant here, this statutory damages provision was first amended in 1976 to add a second measure of recovery pertaining to lease transactions, for which no such remedy then existed because no finance charge is involved. The $100-$1,000 limitation was moved then to follow the lease-related remedy, but otherwise remained unchanged. Following the 1976 amendment, and until the decision below, all courts have agreed that the liability limitation continued to apply to recoveries under both provisions, then and now found at 15 U.S.C. § 1640(a)(2)(A)(i) and (ii).

In 1995, based on a perception that somewhat greater recoveries were appropriate in the case of transactions secured by real property—which had previously been encompassed in the original remedy provision of clause (i)—Congress enacted a third provision, directing that it be

appended at the end of the existing subparagraph (A), and that the word "or" be moved to precede this third and final clause. It is this 1995 amendment, which called for a $200-$2,000 limitation on such mortgage transactions, that the court below held to have exempted Section 1640(a)(2)(A)(i) from the $100-$1,000 liability limitation.

Whatever else one might say about Section 1640(a)(2)(A) following the 1995 amendment, it continued to provide expressly that "liability under this subparagraph shall not be less than $100 nor greater that $1,000," and that is dispositive of this case. For everywhere the word "subparagraph" appears in TILA, it has a specific and unambiguous meaning making reference to those subdivisions of a statutory section that begin with a capitalized alphabetical letter. As the dissent pointed out, this particular meaning is apparent from the immediately adjacent subparagraph, Section 1640(a)(2)(B). Unless the word "subparagraph" is to have a unique meaning in Section 1640(a)(2)(A), different from every other usage in the Act, it must there mean that the liability limitation extends to subparagraph (A) as a whole, and is not limited, as the court below held, to what it referred to as "subparagraph (ii)."

This consistent usage of "subparagraph" in TILA is part of a larger scheme of nomenclature that assigns similar precise meanings to other divisions within the statutory hierarchy—sections, subsections, paragraphs, subparagraphs, and clauses, for example. Nor is it confined to TILA. The same hierarchy is found throughout the United States Code. Nor is it so by accident. Manuals exist for both the House and Senate that strictly define the meaning of these terms, and numerous books have been written making precisely the same point. "Subparagraph" is a term of art in the drafting of federal legislation. Where it is used, the reference is to a statutory division that begins with a capital letter of the alphabet.

This plain meaning of "subparagraph" comports with the overall design of Section 1640(a)(2)(A). The broad language of clauses (i) and (ii) of the subparagraph manifestly addresses all consumer transactions reached by TILA. Clause (iii)'s $2,000 cap for closed-end mortgage transactions—which was added in 1995—is simply a specific exception to the $1,000 cap otherwise applicable to all consumer finance transactions. This contextual understanding of clause (iii) is further confirmed by the absence of the phrase "under this subparagraph" in clause (iii), making clear that the $200-$2,000 limitation applies *only* to clause (iii), and not the whole of subparagraph (A).

Reading Section 1640(a)(2)(A) according to its plain meaning avoids odd and even potentially unconstitutional results, which would otherwise obtain under the Fourth Circuit's interpretation. Without the $1,000 cap, clause (i) would allow individual recoveries running into the tens of thousands of dollars based on virtually strict civil liability. Such large recoveries would render nearly useless TILA's class-action provision, Section 1640(a)(2)(B), where total class recoveries may never exceed $500,000. Since the recoveries in issue bear no relationship whatsoever to actual damages, the resulting statute may also be suspect under constitutional due process standards.

The plain meaning of Section 1640(a)(2)(A) is confirmed by its legislative history, which reveals that Congress never departed from its intention that the $1,000 cap continue to apply to liability under clause (i). From TILA's passage in 1968 until the 1995 amendment adding clause (iii), the $100-$1,000 limitation of subparagraph (A) indisputably applied to both clauses (i) and (ii). Moreover, the 1995 amendment served only to double statutory damages for closed-end mortgages, but did not otherwise alter or re-enact the existing statutory language. Critically, the legislative history makes no mention whatsoever of removing the $100-$1,000 limitation from liability imposed under clause (i), even as it

addressed specifically the much less consequential doubling of the cap by enacting clause (iii).

Finally, reading Section 1640(a)(2)(A) in contravention of its plain meaning would reduce the availability of credit, harm consumers, and impede economic growth. It is predictable that the cost of uncapped liability under clause (i) would be passed through to consumers in the form of increased credit costs generally. As a result, high-risk credit consumers would be further marginalized from the consumer credit market as creditors pass through to them the perceived risk of a disproportionately higher statutory damage recovery attendant to each loan. More generally, this contraction of credit would be a net drag on overall economic growth.

ARGUMENT

The question before this Court is whether the statement at the end of Section 1640(a)(2)(A)(ii) "that the liability under this subparagraph shall not be less than $100 nor greater than $1,000," applies to provision (ii) alone—as the court of appeals held—or to both provisions (i) and (ii). The answer turns on whether "this subparagraph" refers to Section 1640(a)(2)(A), thereby encompassing both provisions (i) and (ii)—or exclusively to provision (ii).

I. UNDER THE PLAIN LANGUAGE OF TILA, THE $1,000 CAP APPLIES TO CLAUSE (i)

As this Court has repeatedly admonished, statutory interpretation begins with the text itself. *See, e.g.*, *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004) ("The starting point in discerning congressional intent is the existing statutory text."); *accord Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). If the text "is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (citations omitted). If a word or phrase either is a "term of art used in many statutes" or has a "long history in federal administrative law," there is a presumption

that this meaning applies. *See, e.g., Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995).

Furthermore, statutory construction "is a holistic endeavor," *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and thus "statutory language must always be read in its proper context" and not "viewed in isolation," *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). "'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citation omitted); *see also Holloway v. United States*, 526 U.S. 1, 6 (1999) ("In interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'"). Where the presumptive meaning of a legislative term of art is confirmed by the overall language and design of the statute, a plain meaning exists and is controlling.

Applying these well-established principles of interpretation here, the phrase "liability under this subparagraph" has a plain meaning that makes clear that the $1,000 cap in Section 1640(a)(2)(A) applies to both clauses (i) and (ii).

A. The Text Of TILA Makes Clear That "Liability Under This Subparagraph" Refers To Liability Under Provision (A)

Congress generally adheres to a fixed hierarchical scheme in subdividing statutory sections. *See generally* Lawrence E. Filson, *The Legislative Drafter's Desk Reference* 222 (1992).

These hierarchical divisions are consistently introduced as follows:

§ . . . .

(a) . . . .

(1) . . . .

(A) . . . .

(i) . . . .

Looking first to the legislation at issue, as this Court has directed, *see, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), TILA not only utilizes these hierarchical divisions, but also consistently uses precise terms to differentiate and reference each level of this hierarchy. In descending order, these terms are "section," "subsection," "paragraph," "subparagraph" and "clause." For example, TILA uses the term "subsection" 117 times, and in each instance the term serves as a reference to the first level subdivision beginning with a lower-case letter. Likewise, the term "paragraph" is used 61 times and consistently refers to the second level subdivision beginning with a cardinal number.[9]

Critically for purposes of this case, every use of the term "subparagraph" in TILA—32 times in all—references a third level subdivision that begins with a capitalized alphabetical

[9] These figures includes instances where TILA provides a subdivision reference together with a multi-level breakdown, such as "paragraphs (1)(A), (3)(B)(i)(I), (4)(A), and (4)(C)(i)(I)," *see, e.g.*, 15 U.S.C. § 1632(c), or "subparagraph (A)(iii)," *see, e.g.*, *id.* § 1638(a)(2)(B)(iv). As both the House Manual and the Senate Manual on legislative drafting explain, "[i]f the reference is to more than 1 unit, the reference is to the senior unit. Thus, refer to section 5(a)(1) and not paragraph 5(a)(1)." *House Legislative Counsel's Manual on Drafting Style* § 341(F)(2), at 52 (2d ed. 1995). (Addendum ("Add.") at 6A) *See also* United States Senate Office of the Legislative Counsel, *Legislative Drafting Manual* § 129(d)(1), at 43 (1997). (Add. 10A) *See generally infra*, Part I.B.

letter.[10] One such usage of the word appears in section 1640(a)(2)(B), immediately following section 1640(a)(2)(A).[11] Like provision (A), provision (B) includes the phrase "under this subparagraph." As used in provision (B), the term "subparagraph" indisputably refers to all of (B),

[10] The references to "subparagraph" in TILA are as follows: 15 U.S.C. § 1602(aa)(2)(A) ("under this subparagraph"); *id.* § 1602(aa)(2)(B) ("under subparagraph (A)"); *id.* § 1602(aa)(2)(C) ("in subparagraph (A)"); *id.* § 1605(f)(2)(A) ("except as provided in subparagraph (B)"); *id.* § 1606(a)(1)(B) ("under subparagraph (A)"); *id.* § 1615(c)(1)(B) ("pursuant to subparagraph (A)"); *id.* § 1632(c)(2)(B) ("under subparagraph (A)"); *id.* § 1632(c)(2)(B)(ii) ("subject to subparagraph (C)"); *id.* § 1637(c)(1)(B) ("under subparagraph (A)"); *id.* § 1637(c)(2)(B) ("Subparagraph (A) shall not"); *id.* § 1637(c)(3)(A) ("requirements of subparagraph (B), (C), or (D)"); *id.* § 1637(c)(3)(B) ("described in subparagraph (A)" and "requirements of this subparagraph"); *id.* § 1637(c)(3)(C) ("described in subparagraph (A)"); *id.* § 1637(c)(3)(D) ("required by subparagraphs (A) and (B)"); *id.* § 1637(c)(3)(E) ("referred to in subparagraph (B), (C), or (D)"); *id.* § 1637(c)(4)(B) ("disclosed under subparagraph (A)"); *id.* § 1637(c)(4)(C)(i)(I) ("described in subparagraph (A)"); *id.* § 1637(c)(4)(C)(i)(II) ("described in subparagraph (B)"); *id.* § 1637(c)(4)(D) ("in subparagraphs (A) and (B)"); *id.* § 1637(d)(2)(B) ("under subparagraph (A)"); *id.* § 1637a(a)(6)(C) ("under this subparagraph"); *id.* § 1637a(a)(7)(B) ("described in subparagraph (A)"); *id.* § 1637a(a)(8)(B) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1637a(a)(8)(C) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1638(a)(2)(B) ("of this subparagraph"); *id.* § 1638(a)(2)(B)(iv) ("the preceding subparagraph (A)(iii)"); *id.* § 1639(b)(2)(B) ("pursuant to subparagraph (A)"); *id.* § 1640(a)(2)(A) ("under this subparagraph"); *id.* § 1640(a)(2)(B) ("under this subparagraph"); *id.* § 1666(a)(3)(A) ("in subparagraph (B)"); *id.* § 1667c(c)(2)(B) ("under subparagraph (A)(iii)").

[11] Section 1640(a)(2)(B) provides in pertinent part:

> (B) in the case of a class action, such amount as the court may allow, except that . . . total recovery *under this subparagraph* in any class action or series of class actions . . . shall not be more than . . . .

15 U.S.C. § 1640(a)(2)(B) (emphasis added).

because the provision has no subdivisions to which the term "subparagraph" could otherwise apply.

It is a general principle of statutory construction that ""identical words used in different parts of the same act are intended to have the same meaning."" *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. at 460 (citation omitted). *See, e.g., Comm'r v. Lundy*, 516 U.S. 235, 249-50 (1996) (same); *Sullivan*, 496 U.S. at 484 (same). Since, in TILA, "subparagraph" always refers to a third level subdivision introduced with a capital letter, in the context of Section 1640(a)(2)(A)'s $1,000 cap on "liability under this subparagraph," "subparagraph" plainly refers to provision (A), and not just to provision (ii).

Consistent with this hierarchical organization, subdivisions in TILA demarcated by lower-case roman numerals are consistently referenced by the term "clause."[12] Indeed, even in Section 1640 the term "clause" is used to reference subdivisions demarcated by lower-case roman numerals. *See, e.g.*, 15 U.S.C. § 1640(i)(1)(B)(ii) ("described in clause (i)"); *id.* § 1640(i)(2)(A) ("described in clause (i) or (ii)") Thus, if the $1,000 cap were intended to apply only to provision (ii), the text at the end of provision (ii) would have referenced "liability under this clause," not "liability under this subparagraph."

In sum, TILA as whole manifests a consistent and precise nomenclature to reference the Act's various levels of subdivision, *i.e.*, "(a) subsection"; "(1) paragraph"; "(A) subparagraph"; and "(i) clause." "Congress obviously chose

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[12] *See, e.g.*, 15 U.S.C. § 1637 (c)(1)(A)(iv)(II) ("to carry out this clause"); *id.* § 1637a(a)(6)(B)(iii) ("described in clause (i)"); *id.* § 1637a(a)(8)(B) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1637a(a)(8)(C) ("described in clauses (i) and (ii) of subparagraph (A)"); *id.* § 1640(i)(1)(B)(ii) ("described in clause (i)"); *id.* § 1640(i)(2)(A) ("described in clause (i) or (ii)"); *id.* § 1667c(c)(1)(C)(ii) ("referred to in clause (i)(II)").

these terms carefully" and, in so doing, established a plain meaning for each. *Estate of Flanigan v. I.R.S.*, 743 F.2d 1526, 1530 (11th Cir. 1984). There is no justification for departing from this uniform terminology.

B. In Using "Subparagraph" To Refer To Provision (A), TILA Follows The Uniform Federal Legislative Drafting Practice

This nomenclature used throughout TILA to differentiate and reference its subdivisions is also used generally throughout the United State Code. *See, e.g., Estate of Flanigan*, 743 F.2d at 1530 ("Section 2055 differentiates between the terms 'section,' 'subsection,' 'paragraph,' and 'subparagraph.'"). Not only does the term "subparagraph" have a plainly apparent meaning in TILA but it also has this same well-established meaning in all federal legislation. That fact is highly relevant in ascertaining the meaning of the word as relevant here. *See, e.g., W.V. Univ. Hosps. v. Casey*, 499 U.S. 83, 88-92 (1991) (searching the United States Code to confirm the general "statutory usage" of "attorney's fees and expert fees").

Official legislative drafting manuals confirm the consistent practice followed by the Senate and the House.[13] The Senate *Legislative Drafting Manual* provides in pertinent part that:

> A section is subdivided and indented as follows:
>
> (a) SUBSECTION.–
>
> (1) PARAGRAPH.–
>
> (A) SUBPARAGRAPH.–
>
> (i) CLAUSE.–

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[13] Pursuant to Supreme Court Rule 32(3), Petitioner, by letter of April 19, 2004, has offered to lodge full copies of the Senate Manual and the House Manual with the Court. Relevant excerpts from these manuals are found in the attached Addendum to this brief.

United States Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 10 (1997). (Add. 9A)

Precisely the same hierarchy and terminology is set out in the House of Representatives' *Manual on Drafting Style*:

> IN GENERAL.—To the maximum extent practicable, a section should be broken into—
>
> (A) subsections (starting with (a));
>
> (B) paragraphs (starting with (1));
>
> (C) subparagraphs (starting with (A));
>
> (D) clauses (starting with (i)); . . . .

House of Representatives Office of the Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* 24 (2d ed. 1995). (Add. 3A) The House Manual also expressly instructs that "indented items within the class designated '(A), (B), (C) . . .' should be consistently referred to as subparagraphs." *Id.* at 51. (Add. 5A)

Other sources likewise make clear that Congress uniformly adheres to this organizational scheme and terminology, including consistent usage of the word "subparagraph." For example, the United States Congress Data Dictionary of Legislative Drafting Documents, which is available on the official House of Representatives internet page, states that:

> Federal legislation is highly structured. The basic unit is the section. Sections can contain seven (7) levels of hierarchy within them (subsection, paragraph, subparagraph, clause, subclause, item and subitem).).

Available at http://xml.house.gov/drafting.htm (last visited April 15, 2004) That same resource expressly defines the term "subparagraph:"

> A hierarchical structure of a measure. This level is contained directly with[in] paragraphs. Levels contained within subparagraphs are clauses, subclauses, items, and subitems. *Subparagraphs are normally enumerated with an uppercased alpha character within parentheses (e.g., (A)).*

Available at http://xml.house.gov/subparagraph.html (last visited April 15, 2004) (emphasis added).[14]

Numerous unofficial sources are to the same effect. For example, the former Deputy Legislative Counsel of the U.S. House of Representatives, in his *Legislative Drafter's Desk Reference*, has stated that, "[i]n Federal statutes—regardless of the style in which they are written—sections that need to be subdivided are *always* broken down successively" according to this scheme. *Id.* at 222 (emphasis added). He also noted "[t]he designation of the inferior subdivisions follows the standard practice, with each such designation consisting simply of a letter or number enclosed in parenthesis—'(a)' for a subsection, '(1)' for a paragraph, *'(A)' for a subparagraph*, '(i)' for a clause, and '(I)' for a subclause." *Id.* at 402 (emphasis added).[15]

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[14] The United States Congress Data Dictionary of Legislative Documents defines a "clause" as:

> A hierarchical structure of a measure. This level is contained directly with[in] subparagraphs. Levels contained within clauses are subclauses, items, and subitems. *Clauses are normally enumerated with lowercased roman-numeral values within parentheses (e.g., (ii)).*

Available at http://xml.house.gov/clause.html (last visited April 15, 2004) (emphasis added).

[15] For further and earlier references to the same consistent practice, *see, e.g.*, Donald Hirsch, *Drafting Federal Law* § 3.8, at 27 (2d ed. 1989) ("Paragraphs are divided into tabulated lettered subparagraphs ('(A)', '(B)', etc.) . . . . Subparagraphs are divided into clauses bearing small roman numerals ('(i)', '(ii)', '(iii)', '(iv)'), that are, in turn, divided into clauses . . . ."); Maxwell J. Mehlman & Edward G. Grossman, *Yale Legislative Services Handbook of Legislative Drafting* 100 (1977) ("A section is sometimes broken down beyond the 'paragraph' into 'subparagraphs' (enumerated with capital letters in parentheses; e.g., '(A)') and 'clauses' (enumerated with lower-case letters in parentheses;

A Westlaw research query for the phrase "under this subparagraph" in the United States Code database confirms that these numerous legislative sources are firmly grounded in reality. In the 716 statutes that include the phrase "under this subparagraph," the word "subparagraph" is virtually always used according to its well-established meaning—*i.e.*, a third-tier subdivision of a statutory section demarcated by a capitalized alpha character.

Accordingly, the long-established and consistent meaning of the word "subparagraph," as used within TILA and throughout the United States Code leads inexorably to the conclusion that the $1,000 limitation in § 1640(a)(2)(A)(ii) applies to provision (A) generally, and not merely to clause (ii).

C. The Plain Meaning Of "Subparagraph" Is Consistent With The Overall Design Of Provision (A)

The decision below ruled out the possibility that the $1,000 limitation could apply to provision (A) generally, on the ground that such reasoning would "render meaningless the maximum and minimum articulated in (iii)." (Pet. App. 11a) But a careful reading of the related provisions in context with each other makes clear that clause (iii)'s $2,000 cap is a narrow and specific exception to the $1,000 cap, applying only to closed-end mortgages covered by clause (iii). *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("'Words are not pebbles in alien juxtaposition; they

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e.g., '(i)')."); Reed Dickerson, *Legislative Drafting* 73-74 (1977 (originally published in 1954)) ("For divisions of a subsection (called 'paragraphs'), use '(1),' '(2),' '(3),' etc. For divisions of a paragraph (called 'subparagraphs'), use '(A),' '(B),' '(C),' etc."); James Craig Peacock, *Notes on Legislative Drafting* 12 (1961) (referencing that "paragraphs [are] designated (1), (2), (3)," "sub-paragraphs [are] designated (A), (B), (C)," and "clauses (i), (ii), (iii)").

have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)).

First, by their terms, clause (i) applies to all consumer transactions involving a finance charge and affords a recovery of "twice the amount of any finance charge" capped at $1,000, and clause (ii) applies to all consumer lease transactions, affording a statutory damages recovery likewise capped at $1,000. Thus, together, clauses (i) and (ii) on their face cover the entire field of consumer transactions reached by TILA.

Clause (iii) addresses specifically closed-end mortgage loans, otherwise covered by clause (i), and affords this sub-class of consumer financing transactions a higher $200-$2,000 statutory limitation. Indeed, that clause (iii) only operates as a carve-out allowing a higher liability window for certain transactions already referenced in clause (i) is apparent from the fact that clause (iii) itself does not include any measure of damages. Rather, clause (iii) relies on clause (i)'s "twice the amount of any finance charge" calculation, which by the terms of clause (i) applies to all consumer finance transactions. *See, e.g.*, *In re Ralls*, 230 B.R. 508, 522 (E.D. Pa. 1999) (holding that statutory damages under clause (iii) "are measured by double the amount of the finance charges imposed in the transaction up to $2,000"). Clause (iii) then simply restricts doubled finance charges to a window of $200-$2,000.

Thus, clause (iii) in substance is simply a limited exception to transactions that are otherwise covered on the face of clause (i). *See* Pet. App. 22a (Gregory, J., dissenting) ("[T]he most logical interpretation of the statute is to read the phrase 'under this subparagraph' as applying generally to [subparagraph (A)] . . . and to read [clause (iii)] as creating a specific carve-out from that general rule for real-estate

transactions."); *see also Strange*, 129 F.3d at 947 ("In our view, the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damages awards for [clauses (i) and (ii)].").

Second, this reading is further confirmed by the fact that, had Congress intended the $1,000 cap to apply only to liability under clause (ii), the words "under this subparagraph" would have been completely unnecessary. (Pet. App. 21a (Gregory, J., dissenting)) Without the words "under this subparagraph," the $1,000 limitation could only have been read to apply to clause (ii). Thus, if "subparagraph" were intended to refer only to clause (ii), not only would this use be completely inconsistent with the term's plain meaning, but also the phrase would be superfluous. This "means, of course, that such a reading must be rejected." *See, e.g., FCC v. NextWave Pers. Communs., Inc.*, 537 U.S. 293, 302 (2003).

Third, it is also quite significant that the $2,000 cap in clause (iii)—which all agree applies only to that clause—does not include the phrase "under this subparagraph." By omitting that phrase, the drafters rendered the $200-$2,000 limitation applicable only to clause (iii), while the $100-$1,000 limitation after clause (ii) was expressly made applicable to the remainder of subparagraph (A)—that is clauses (i) and (ii).

D. Reading "Subparagraph" According To Its Plain Meaning Avoids Odd And Potentially Unconstitutional Results

It also bears noting that the Fourth Circuit's singular construction of the word "subparagraph" produces consequences under the Act that are at best extremely odd, and at worst, unconstitutional.

Reading clause (i) without the $1,000 cap will produce many recoveries running into the tens of thousands of dollars, for highly technical violations that give rise to strict

liability. Moreover, these windfall awards would bear no relationship whatsoever to actual damages, and, indeed, would be available in addition to actual damages. *See* 15 U.S.C. § 1640(a)(1).

As an example, here Nigh recovered $24,192.80 in statutory damages despite the fact that he proved no actual damages and despite the fact that the only alleged TILA violation was the erroneous inclusion of a $965 Silencer product on a retail installment sales contract that never even took effect, and on which no money was ever paid. It is at best strange that such a recovery would be allowed in this case, while liability based on the lease of a similar vehicle would be capped at $1,000, and a cap of $2,000 would apply if the dealer had the foresight to secure the whole transaction with a mortgage on the purchaser's home.

Further, absence of the $1,000 cap on liability imposed in individual actions under clause (i) would, as a practical matter, largely eliminate the utility of the class-action provision of Section 1640(a)(2)(B). As discussed above, the class action provision states "recovery under this subparagraph" "shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." *See supra* footnote 4. For example, if a class action with 1,000 members were brought, the *maximum* average recovery per class member would be $500 ($500,000/1,000); however, were class members to pursue their claims individually under clause (i), each member's recovery for the same violations could, under the Fourth Circuit's construction, easily run well into the thousands of dollars. This differential creates not only a substantial likelihood for opt-out in class actions certified under Federal Rule of Civil Procedure 23(b)(3), but calls into question whether such class actions would even meet the superiority inquiry of Rule 23(b)(3), since pursuit of individual actions under clause (i) would plainly and routinely offer a far greater recovery. *See* Fed. R. Civ. P. 23(b)(3).

Also troubling is the risk that many of these windfall recoveries could be constitutionally suspect, as this Court has similarly held where jury awards of exemplary damages were excessive. *See, e.g., State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This offers yet another reason why "subparagraph" should be accorded its usual meaning here. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.").

II. THE HISTORY OF SECTION 1640(a) CONFIRMS THAT THE $1,000 CAP CONTINUES TO APPLY TO LIABILITY UNDER CLAUSE (i)

The evolution and legislative history of TILA's statutory damage provision confirm both that the $1,000 cap was originally intended to apply to liability under what is now clause (i) and that Congress has never departed from this intention. *See, e.g., Reno v. Koray*, 515 U.S. 50, 59 (1995) (relying on "context and history" of a statutory section to confirm its meaning).

When first enacted in 1968, TILA only provided the statutory damage recovery now found in clause (i)—*i.e.*, "twice the amount of the finance charge in connection with the transaction."[16] Importantly, this statutory damage

[16] In relevant part, the original provision read:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability *under this paragraph* shall not be less than $100 nor greater than $1,000;

provision, which was located at Section 1640(a)(1), provided that "liability under this paragraph"—referring there to paragraph (1)—shall not be less than $100 nor greater than $1,000. Since the only liability provided for in paragraph (1) was "twice the amount of the finance charge," there was never any question that this recovery was capped at $1,000.

In 1974, Congress relocated TILA's statutory damages provision from 1640(a)(1) to new provision 1640(a)(2)(A). In doing so, Congress removed the phrase "liability under this paragraph" and replaced it with "liability under this subparagraph."[17] Pub. L. No. 93-495, § 408, 88 Stat. at 1518. This careful change in terminology to correspond with the relocation of the text to subparagraph (A) makes apparent that Congress intended the $1,000 cap to apply to the whole of provision (A). And of course, this action by Congress was entirely consistent with its long-established usage of the words "paragraph" and "subparagraph."

Congress' 1976 amendments to Section 1640(a), adding a cause of action relating to lease transactions, changed none of this, and the $1,000 cap continued to apply to the whole of subparagraph (A). All that Congress did in 1976 was to modify provision (A) to "insert '(i)' after '(A)'" and to add the text of current clause (ii). Neither the text of clause (i) nor the statutory damage cap was otherwise changed.[18] Pub.

Pub. L. No. 90-321, § 130, 82 Stat. at 157 (1968) (emphasis added).

[17] The relocated and amended text provided:

> (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000;

[18] With these revisions, provision (A) read in pertinent part:

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case

L. No. 94-240 (1976). Further, the legislative history expresses only an intent to add a provision allowing a statutory recovery for leases that was capped at $1,000. *See* H.R. REP. NO. 94-872, at 10, *reprinted in* 1976 U.S.C.C.A.N. 442, 445-46. It makes no mention of eliminating the $1,000 cap from clause (i). Thus, "[c]ourts uniformly interpreted the . . . $100 minimum and the $1,000 maximum[] as applying to both (A)(i) and (A)(ii)." *Strange*, 129 F.3d at 947.

There is every reason to assume that Congress, in 1995, was aware of this existing state of the law. *See, e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 546 (1988) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). And, in adding clause (iii), no member gave any hint that this change might eliminate the $1,000 cap on liability under clause (i).[19]

Surely "if Congress had such an intent, . . . at least some of the Members would have identified or mentioned it at some point," *Chisom v. Roemer*, 501 U.S. 380, 396 n.23

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of an individual action relating to a consumer lease under . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000;

See Pub. L. No. 94-240 (1976).

[19] Indeed, the legislative history makes clear that what Congress actually sought to do was remove closed-end mortgages from the general scope of clause (i) in order to double the cap on these mortgages to $2,000. For example, the Committee report states "this amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling." H.R. REP. NO. 104-193, at 99. The floor statements in the Senate and House are even more explicit, stating that "the bill raises the statutory damages for individual actions from $1,000 to $2,000." 141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); *see also* 141 Cong. Rec. H9515 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum) (same).

(1991), for the resulting increase in statutory liability is substantial to say the least.[20] As *amici curiae* ABA, AFSA and CBA demonstrated in their brief in support of *certiorari*, on the most "ultra-conservative assumptions," the additional TILA liability on the auto industry alone would be $47.5 to $110 million for new car sales, and upwards of $180 million for used car sales. Brief of ABA, AFSA and CBA as *Amici Curiae* in Support of *Certiorari* 10-11. Of course, these figures represent only the tip of the iceberg because they do not account for the likely impact on, among other areas of consumer credit, credit-card debt, home-equity credit, and consumer loans for recreational vehicles and boats.

In all events, given the remarkable volume and dollar value of covered transactions, and the radical nature of the change that the Fourth Circuit found to have been implemented, it is truly incredible that the members of Congress would have spent time discussing the $1,000 increase in potential liability under clause (iii), but never even mentioned complete elimination of the cap on clause (i). "'In a case where the construction of legislative

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[20] *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 233-34 (1998) (stating that neither the language nor the legislative history of an amendment that made a certain subsection parallel to a later enacted subsection suggested that "Congress intended to change, or to clarify, the fundamental relationship between the two subsections"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993) (rejecting asserted interpretation of amendment to statute because "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect" in the legislative history); *Clarke v. Sec. Indus. Assoc.*, 479 U.S. 388, 405-06 (1987) (rejecting asserted change in statutory meaning by changing certain words when there was "nothing in the legislative history . . . indicating that this change in the wording had substantive significance"); *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (concluding that "Congress intended nothing by the change in language" "[b]ecause the legislative history contains no indication that the variation in the language had changed the meaning" of the statute).

language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.'" *Chisom*, 501 U.S. at 396 n.23 (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

In this regard, it is equally incredible that not a single member of Congress referenced the elimination of the $100 floor on clause (i) liability. As Respondent points out in his opposition to *certiorari*, many TILA violations involve finance charges that, when doubled, are less than $100 (such as TILA violations involving credit card accounts). (Opp. 7-8) Thus, eliminating the $100 minimum might well discourage some consumers from acting as "private attorneys general"—enforcing both their own rights and deterring future violations—despite the undisputed fact that throughout TILA's history this has been a recognized purpose of the statutory damages provision.

To say the least, nothing in the legislative history remotely suggests a reason to depart from the uniform meaning of the word "subparagraph" or the longstanding authority that the statutory damages remedy of 15 U.S.C. § 1640(a)(2)(A)(i) is constrained by the $100-$1,000 limitation that now appears in 15 U.S.C. § 1640(a)(2)(A)(ii). *See* Elwin Griffith, *Searching for the Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 306 (2000) ("[The amended subparagraph (A) should be read] to preserve the original legislative meaning, while recognizing the subsequent legislative intent to craft more generous terms for certain secured transactions.").

III. THE FOURTH CIRCUIT'S READING OF TILA WOULD REDUCE THE AVAILABILITY OF CREDIT, HARM CONSUMERS, AND IMPEDE ECONOMIC GROWTH

The expansive and unprincipled construction of TILA's statutory-damage provision will increase the cost of credit to the detriment of credit consumers, particularly high-risk credit consumers, who are already on the margin.

The court of appeals' interpretation would raise the cost of credit generally because it would expose creditors to uncapped liability for even technical TILA violations. And as the *amici* have stated, this additional liability would lead to no appreciable reduction in technical TILA violations and would simply serve to increase lenders' costs. Brief of ABA, AFSA and CBA as *Amici Curiae* in Support of Petitioner at pt. II.; *see also* Peter Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 641 (1995). Worse, however, these increased costs would be substantially passed through to borrowers in the form of higher interest rates and related fees. R. Elizabeth Topoluk, *Predatory Lending: Minnesota and Illinois Developments*, 55 CONSUMER FIN. L.Q. REP. 86, 92 (2001) (imposing penalties on creditors for various "technical pitfalls" in lending practices will ultimately have the "inevitable results [of] higher costs to consumers, and reduced credit availability from traditional lenders").

Moreover, these passed-through costs would fall particularly hard on high-risk consumers—*i.e.*, those with few assets, little collateral, or poor credit histories. *Cf.* Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 180 (2002) (usury laws reduce high-risk debtor access to credit). These consumers already have substantial difficulty obtaining credit and the additional costs that would follow from the court of appeals' interpretation would only serve to further push these credit consumers out of the market. This is

doubly so because high-risk credit consumers typically pay the greatest finance charges, meaning that the passed-through costs of uncapped liability of twice the finance charge for this group would be particularly hard hitting.

Finally, the contraction of credit that may thus be anticipated will likewise detrimentally impact the economy as a whole. Without attempting to quantify this effect, it is safe to say that it will have an appreciable negative influence on economic growth.

CONCLUSION

The court of appeals' decision on the award under TILA should be vacated, and the case should be remanded.[21]

Respectfully submitted,

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April 19, 2004

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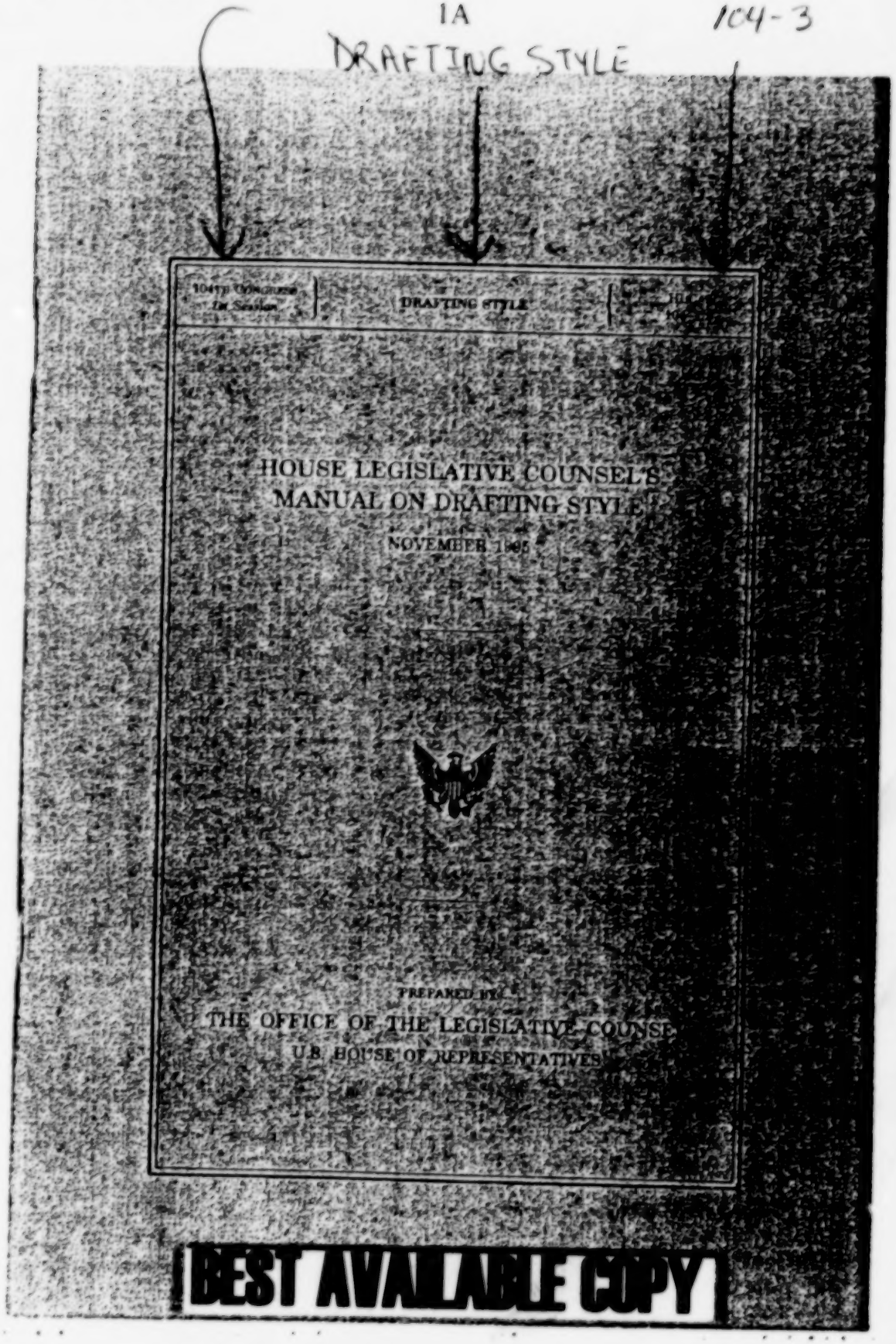
[21] In addition to correction of the damage award under TILA, the district court on remand must reconsider the $26,192.10 award of attorneys' fees in light of the amount of total recovery. (Pet. App. 53a) *See generally* 15 U.S.C. § 1640(a)(3).



written. It is not intended to be a complete compendium of drafting rules and conventions.

Subtitle B—Organization and Structure

SEC. 311. ORGANIZATION.

Before choosing an organization for a draft, determine to what extent it could appropriately fit into the following arrangement:

(1) GENERAL RULE.—State the main message.

(2) EXCEPTIONS.—Describe the persons or things to which the main message does not apply.

(3) SPECIAL RULES.—Describe the persons or things—

(A) to which the main message applies in a different way; or

(B) for which there is a different message.

(4) TRANSITIONAL RULES.—Describe the rules that are transitional and either are especially important or will have effect for a relatively long period of time.

(5) OTHER PROVISIONS.

(6) DEFINITIONS.—See section 326.

(7) EFFECTIVE DATE.—See section 329.

SEC. 312. STRUCTURE.

(a) SECTION BREAKDOWN AND FORMAT.—

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(1) IN GENERAL.—To the maximum extent practicable, a section should be broken into—

(A) subsections (starting with (a));

(B) paragraphs (starting with (1));

(C) subparagraphs (starting with (A));

(D) clauses (starting with (i)); and

(E) subclauses (starting with (I)).

(2) SECTION HEADINGS.—If section headings are used, then all sections in the bill should have them, including section 1.

(b) MULTIPLE SUBDIVISIONS.—If there is a subdivision of the text of a unit, there should not be a different kind of subdivision of that unit unless the latter is part of the 1st subdivision. Thus, the following is incorrect:

"(a) One often finds the need for subdivisions. Subdivisions may take the form of—

"(1) paragraphs; or

"(2) other divisions.

In complex legislation there often is the need for multiple subdivisions. Such subdivisions are often found in—

"(A) the Social Security Act . . . ".

The example should be restated as follows:

"(a)(1) One often finds the need for subdivisions. Subdivisions may take the form of—

"(A) paragraphs: or

"(B) other divisions.

"(2) In complex legislation there often is the need for multiple subdivisions. Such subdivisions are often found in—

"(A) the Social Security Act . . . ".

Subtitle C—Particular Legislative Provisions

SEC. 321. LONG TITLE.

(a) IN GENERAL.—A title should accurately and briefly describe what a bill does.

(b) AMENDATORY BILLS.— For bills amending primarily 1 law, use the form "To amend [citation of law] to . . . ".

(c) CONSTITUTIONAL AMENDMENTS.—For constitutional amendments, use the form "Proposing an amendment to the Constitution of the United States concerning . . . ".

(d) AND FOR OTHER PURPOSES.—If the bill covers multiple items, ", and for other purposes" may be used at the end of the title instead of describing each item.

(e) PRIVATE RELIEF.—For private relief, use the form "For the relief of . . . ".

(d) POPULAR NAMES.—In the case of a non-positive law Act without a short title but with a generally-known popular name, the popular name may be included in the parenthetical reference if it would aid the reader. Example: "section 343 of Public Law 91-353 (9 U.S.C. 343; commonly known as the Chappell-Bell Act)".

(e) REFERENCES WITHIN AN ACT OR SECTION.—Omit "of this Act", "of this section", or similar references unless another Act or provision is also made reference to, and clarity would be increased by including the phrase.

(f) REFERENCES TO COMPONENTS OF A SECTION.—

(1) REFERENCE BASED ON A PROVISION'S ALPHABETICAL OR NUMERICAL DESIGNATION.—For uniformity, refer to any separately indented provision on the basis of its class designation. For example, indented items within the class designated "(1), (2), (3) . . . " should be consistently referred to as paragraphs; and indented items within the class designated "(A), (B), (C) . . . " should be consistently referred to as subparagraphs. However, if "(1)" or "(A)" is not indented. then it is always referred to as a clause or subclause. But note that some old laws have different designations and it may be confusing not to follow those designations. For example,

the Federal Food, Drug, and Cosmetic Act consistently refers to ...its beginning "(a)", etc. as paragraphs.

(2) REFERENCE TO MORE THAN 1 UNIT.—If the reference is to more than 1 unit, the reference is to the senior unit. Thus, refer to section 5(a)(1) and not paragraph 5(a)(1).

(3) MULTIPLE BREAKDOWNS.—

(A) IN GENERAL.—For clarity and brevity's sake, "section 503(b)(2)(A)(i) of the XYZ Act" is preferred to "clause (i) of subparagraph (A) of paragraph (2) of subsection (b) of section 503 of the XYZ Act".

(B) EXCEPTIONS.—

(i) IN AMENDMENTS.—When amending section 503(b)(2)(A)(i), the amendment should be stated as an amendment to clause (i) of section 503(b)(2)(A).

(ii) LATER REFERENCE.—It may also be beneficial to cite to "clause (i) of section 503(B)(2)(A) of the XYZ Act" if a later reference is to be made back to "such clause".

(iii) JOINT REFERENCES.—Similarly, it is easier to understand a citation to 2 or

LEGISLATIVE DRAFTING MANUAL

OFFICE OF THE LEGISLATIVE COUNSEL

UNITED STATES SENATE

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SECTION 1. SHORT TITLE; TABLE OF CONTENTS; REFERENCES.
SEC. 2. FINDINGS AND PURPOSES.
SEC. 3. DEFINITIONS.

TITLE I—MAJOR LEGISLATIVE COMPONENT
SEC. 1001.
Subtitle A—
SEC. 1101.
CHAPTER 1—
SEC. 1111.
Subchapter A—
SEC. 1121.
PART I—
SEC. 1131.
Subpart A—
SEC. 1141.
Subtitle B—
SEC. 1201.

TITLE II—MAJOR LEGISLATIVE COMPONENT
SEC. 2001.
SEC. 2002.
SEC. 2003.

SEC. 112. ORGANIZATION OF A SECTION.

(a) IN GENERAL.—A section contains some or all of the following provisions and is organized as follows:

SEC. 101. SECTION HEADING.
(a) DEFINITIONS.—
(b) GENERAL RULE.—
(c) EXCEPTIONS.—
(d) SPECIAL RULES.—
(e) TRANSITION RULES.—
(f) EFFECTIVE DATE.—

(b) SECTION BREAKDOWN.—A section is subdivided and indented as follows:

(a) SUBSECTION.—
(1) PARAGRAPH.—
(A) SUBPARAGRAPH.—
(i) CLAUSE.—
(I) SUBCLAUSE.—
(aa) ITEM.—[To be avoided].
(AA) SUBITEM.—[To be avoided].

(c) SINGLE CONCEPT.—Each subdivision of a draft should express a single concept.

(d) CUT-INS FOLLOWED BY FLUSH LANGUAGE.—

(1) IN GENERAL.—Text in the following form is referred to as a cut-in followed by flush language (i.e., text printed flush to the margin):

(a) CRITERIA FOR AWARD.—If the Secretary finds that—
(1) the project will protect the environment in accordance with the requirements of this Act; and
(2) the applicant has the technical expertise necessary to carry out the project;
the Secretary shall award a grant to the applicant.

(2) AVOIDANCE.—Avoid using a cut-in followed by flush language, because doing so makes it difficult to amend the provision later.

(3) CORRECT FORM.—The example given in paragraph (1) should be redrafted as follows:

(a) CRITERIA FOR AWARD.—The Secretary shall award a grant to the applicant if the Secretary finds that—

(d) REFERENCES TO A PROVISION WITHIN A PROVISION.—

(1) REFERENCES TO 1 PROVISION WITHIN A PROVISION.—Refer to "section 123(a)(1)(A) of the ABC Act (YY U.S.C. ZZZ(a)(1)(A))" [*not* "subparagraph (A) of paragraph (1) of subsection (a) of section 123 of the ABC Act (YY U.S.C. ZZZ(a)(1)(A))"].

(2) REFERENCES TO MORE THAN 1 PROVISION WITHIN A PROVISION.—Refer to "subparagraphs (A) and (B) of section 123(a)(1) of the ABC Act (YY U.S.C. ZZZ(a)(1))" [*not* "section 123(a)(1) (A) and (B) of the ABC Act (YY U.S.C. ZZZ(a)(1) (A) and (B))"].

(e) ROGUE LAWS.—

(1) NO ALPHABETICAL OR NUMERICAL DESIGNATIONS.—In the case of a section that contains more than 1 undesignated indented provision, each provision is referred to as an "undesignated paragraph" (not a subsection), e.g. the fourth undesignated paragraph of section 123 of the ABC Act (YY U.S.C. ZZZ).

(2) DESIGNATED TEXT NOT INDENTED.—In the case of a provision that contains text that is designated but not indented, refer to each provision using the designation listed in section 112(b) that